United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1071

B
pls.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JOHN VAN ORSDELL, Defendant- Appellant.	Docket No. 75-1071

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

and appendix
BRIEF OF DEFENDANT-APPELLANT

MARK LEMLE AMSTERDAM
12 Bedford Street
New York, New York 10014
212-675-6559

Attorney for Defendant-Appellant

UNITED STATES COURT OF APPEALS
FILED
APR 30 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF CASES

ISSUES PRESENTED FOR REVIEW

Whether the defendant was denied his right to discover the existence of electronic surveillance?

Whether the affidavits submitted by the Government are facially inadequate to deny the existence of electronic surveillance?

Whether the court below erred in refusing to hold a hearing on the question of electronic surveillance?

Whether the court below erred in refusing to order the Government to disclose the name of the so-called "confidential source?"

PRELIMINARY STATEMENT

Defendant was convicted in a jury trial before Judge Whitman Knapp on November 15, 1974. Defendant was sentenced on January 10, 1975 to a term of confinement for two years to be followed by probation for five years.

This was recognized by all concerned as a bizarre case. The Jury deliberated for twelve hours, apparently over the question of whether defendant was truly attempting to expose the FBI or whether he was merely trying to extort money. Regardless of intent, the FBI

was a real party in interest expending huge amounts of resources on defendant's apprehension. Defendant submits that included in these resources was unlawful electronic surveillance and that his arrest and all the evidence against him resulted from such surveillance. It is from this unlawfully obtained and thoroughly tainted conviction that defendant appeals.

STATEMENT OF FACTS

The facts in this case were in most part undisputed; it was the interpretation of the facts which was the focus of the trial.

John Van Orsdell is a 41 year old writer who has authored several screenplays and has published the presidential novel, Ragland. In February of 1973 the defendant was visited by a man who introduced himself as a member of the Justice Department who had read Ragland and thought defendant might be able to write about the way in which the FBI was unsupervised by Governmental officials and unnecessarily exposed people to danger. (Tr. 692) The man, who identified himself only by the name Herbert Vore, a character from Ragland, said that he wanted to create an incident which would lead to an investigation of the bureau. (Tr. 692) Vore stated that he was particularly concerned about

the manner in which the FBI jeopardized human lives by paying off kidnap or extortion demands with fake money. (Tr. 694)

Defendant at that time knew little about the bureau but was upset about the manner in which Timothy Leary had been treated and especially about Leary's imprisonment. Out of the conversation with Vore, a bizarre scheme developed. Defendant would write a letter threatening to put LSD in the water supply of a luxury hotel unless a sum of money was paid. (Tr. 695) Mr. Vore, after reading Ragland, thought that defendant, if he was interested, would be sufficiently resourceful to invent an appropriate drop for the money. (Tr. 698-699)

During the next several months, defendant and Vore had several telephone conversations, Vore always doing the calling since defendant knew nothing about the man except what Vore chose to reveal. This man, identified only through the name Herbert Vore, did not surface for defendant's trial. He was not indicted nor is his identity known to this date.

After Mr. Vore left defendant's apartment, defendant began to do some preliminary research on the FBI and began to be concerned about some of the FBI's tactics and operations. (Tr. 701)

By April 1, 1973, defendant had made up his mind to engage in the scheme Mr. Vore had previously outlined. (Tr. 704) Around that time defendant told one of his acquaintances, Wayne Adams, that he planned to go after one of the absurdities of our Government. (Tr. 706) Defendant told Adams that he needed him

to remember what defendant was going to tell him, to put the information in his "memory bank" and "lock it away," so that if he were ever needed as a witness, he would remember it. (Tr. 609) Defendant told Adams three things:

1. "I have embarked upon a conceivably perilous course to publicly expose the FBI."
2. "The first of spring is a new beginning."
3. "Money can be funny."

(Tr. 610)

The defendant then approached two young people, Inese Gerke and Bob Greenman, who were not informed of all the details, but who were soon embarked on their "perilous course." A drop for the money was found; a safety deposit box was rented in which the original documents would be kept to avoid fingerprint identification. Only xerox copies would be mailed. On June 30, 1973, a copy of a letter was mailed to the Concord Hotel. The letter stated that unless a specified amount of money was received, LSD would be put in the water supply of the hotel. The sum of money requested was $320,000, 3/20 being the first day of spring. (Tr. 725)

On July 6, the payoff was made as planned in the ladies room at Grand Central Station. Unknown to the FBI, whose courier was making the drop and who had several agents closely watching the entire operation, there were two exits from the ladies room. While the FBI concentrated on one exit, Inese Gerke, defendant's

assistant, walked out the other exit - with the payoff. After taking the money to the bank, where the safety deposit box had been rented, it was first learned that the FBI had indeed used phoney money. (Tr. 247) Also present in the payoff bag was a transmitter, which, unknown to defendants, was not working. Thus, the defendants foiled the FBI by making good their escape. The defendant was to remain at large for three more months.

A few months after the drop, on July 23, or 24, defendant mailed a letter to the special agent of the FBI in charge of the New York office. (Tr. 726) This insolent and insulting letter demanded the release of Timothy Leary and threatened to expose the whole caper thereby publicly embarassing the FBI if the demand was not met. Thereafter, an advertisement was put in the Village Voice to further embarass the FBI. Calling the whole operation the "Crayola Caper" because the original letter to the Concord had been signed in crayon, the ad read "Crayola 2, FBI 0." (Tr. 730) Then another ad was placed saying "Crayola 5, FBI 0." (Tr. 730)

In order to publicize the caper, defendant went to the Washington, D.C. office of Jack Anderson, a nationally known columnist, and revealed the operation to Joe Spear, one of Anderson's associates. (Tr. 725)*

---

* Defendant also explained the story to a reporter outside of Philadelphia, Bob Boyle. (Tr. 735)

Spear wanted proof of the caper and asked defendant to obtain his copy of the letter to the Concord and bring it to Washington. It was then the end of September, 1973, and defendant had not been arrested.

To get the letter, defendant called his assistant Bob Greenman at his home. (Tr. 744) He told Greenman to go to the bank and get the letter and mail it to Joe Spear.

Bob Greenman did as he said he would; on October 5, 1973, three months after the payoff had been made in Grand Central Station, he went to the bank. FBI agents were waiting for him at the bank and arrested him. Defendant's arrest soon followed.

Both Greenman and Gerke were promised immunity if they would testify. Both testified against defendant. The Government's position was that the political nature of the plot was not developed until after the defendant had obtained the fake money. The Government took this position despite the testimony of Wayne Adams that before the letter was sent to the Concord, defendant had stated that he was going after the FBI and, despite defendant's retention of the original letter to the Concord and the receipts for the registered letters to the Concord and to the FBI.

Regardless of defendant's intent, the FBI was a party in interest to these proceedings. They had been publicly embarassed by the ads in the Village Voice and even more so by a

Jack Anderson article which described the whole episode. To capture defendant, the FBI expended huge amounts of money and manpower. Defendant submits that included among these resources was electronic surveillance. The FBI had denied the existence of any electronic surveillance and, while refusing to reveal its identity, stated that their information came from a "confidential source." However, the Government has refused to disclose the identity of this so-called "confidential source."

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ORDER FURTHER WIRETAP DISCLOSURE

A. The Government Affidavits Were Facially Inadequate In Failing to Deny Overhearings

In response to defendant's pretrial motions, the Government furnished several affidavits purporting to deny the existence of electronic surveillance. The affidavit from the FBI, however, was couched in such vague language that it was objected to by defendant as being facially inadequate. (Tr. 3) Pursuant to the trial court's directive, the Government asked the FBI to submit a further affidavit; this affidavit was not submitted until after the trial. (Sentencing Minutes, p. 2) These affidavits from the FBI are facially insufficient to deny the existence of surveillance by that agency and further denials

are required.*

The FBI affidavit by agent Harwood, dated October 11, 1974, denies only that defendant was "the subject of a direct electronic surveillance." The second affidavit of December 5, 1974, merely states that agent Harwood did not intend to equivocate in using the term "direct." However, it does not deny "indirect" surveillance as the court had requested. (Tr. 5) The second affidavit, as the first, ends with the reiteration that defendant was never "monitored" by electronic devices. However, all this statement means is that defendant was not the "subject" of surveillance.

The affidavits are facially insufficient as a matter of law since they fail to affirm or deny whether defendant was overheard by any electronic surveillances. It is overhearings, not merely direct surveillance, that a defendant has standing to suppress. Alderman v. United States, 394 U.S. 165 (1969). The Government must:

> ...disclose to a criminal defendant any surveillance records which are relevant to the issue of whether the evidence against him grew out of his illegally overheard conversations or conversations occuring on his premises.
>
> Alderman v. United States, supra, 394 U.S. at 183 (Emphasis added)

---

* Copies of the affidavits submitted by the Government are attached in the Appendix hereto.

Thus, the affidavits submitted by the Government must not only deny direct monitoring, they must also deny overhearings. This is the clear requirement of Alderman. Indeed, several of the affidavits from other agencies submitted by the Government in this case speak to "overhearings" rather than merely direct monitoring. For example, the affidavit from Mr. Diseroad of the Postal Inspection Service denies surveillance directed at defendant's premises and overhearings of the individual, thus meeting the twofold requirement of Alderman. (See also the affidavits from the I.R.S. and the Drug Enforcement Administration)*

The question of overhearings as opposed to direct surveillance is especially important in this case as a result of the factual inferences of actual overhearings. Defendant is convinced that the FBI was conducting systematic electronic surveillance. It was only after making a phone call from Jack Anderson's office that defendant was arrested. In the call, defendant asked his alleged co-conspirator Greenman to go to the bank to get the original papers for Jack Anderson. The FBI

---

* The FBI makes a clear distinction between the "subject" of surveillance and one who is overheard. The "subject" of an investigation means that "an installation was at that particular residence, address." Hearing on Electronic Surveillance, May 2, 1972, United States v. Ahmad, Crim. No. 14950 (M.D., Pa.), testimony of Owen Watt, Special Agent, F.B.I.

claims to havestarted surveillance at the bank at this time on the basis of a "confidential source." It was then three months after the money drop and defendant had not yet been arrested nor had any surveillance been undertaken. The timing between the call and the arrest was not mere coincidence. The trial judge stated that there seemed to be a "presumption" that the telephone call and arrest were connected. (Tr. 492) The failure of the FBI to speak to "overhearings" becomes all the more ominous. This is especially true where the FBI was specifically requested to address themselves to "indirect surveillance", i.e., overhearings (Tr. 5) and still omitted any reference to overhearings.

Even the language of the FBI affidavits is ominous since it is so conclusory and terse as opposed to the more specific affidavits of the other agencies submitted herein. Not only the omission of overhearings, which other agencies specifically include, but the use of such technical language itself gives rise to an inference that the FBI is not revealing all that is required. (See Subpoint B, infra.)

In any event, the affidavits must in the first instance affirm or deny the existence of overhearings as well as direct surveillance. Alderman, Supra; United States v. Hoffman, No. 973-71

(D.D.C. Order dated Nov. 23, 1971)(Defendant had standing to object since he was a "party to the overheard conversations.")

Since defendant objected to the sufficiency of the FBI affidavit, and the affidavit is insufficient as a matter of law, the matter should be remanded to the district court for further proceedings.

B. The Trial Court Erred in Refusing to Hold an Evidentiary Hearing on the Question of Surveillance

In an attempt to ascertain the source of the Government's information, defendant requested an evidentiary hearing. (Tr. 510) The hearing was needed as a result of the Government's blanket statements that a "confidential source" was the origin of their information (Tr. 493), and their continued refusal to divulge the nature of the method of apprehension. (Tr. 492) The timing between the phone call from the office of Jack Anderson and the arrest was such that the trial judge stated it raised a "presumption" of connection between the two events (Tr. 492); this presumption was never dispelled. The basis for the Government's refusal to reveal the name of their "confidential source" was apparently that disclosure would "lead to a rule, to a contention that every defendant...would then be entitled to learn the method by which their apprehension was achieved." (Tr. 492) Without saying why this proposition was so startling, the Government merely fell back on the language of "confidential source" and refused to

divulge the identity of their informant. The recalcitrance of the Government's position taken with the absence of denial by the FBI of overhearings raised a serious factual question that was never resolved.

As defendant's counsel noted, "confidential source" is often a euphemism for wiretapping. As the record reflects (Tr. 493), defendant's counsel had just finished a trial regarding Wounded Knee in which the U.S. Attorney had attempted to thwart a wiretap hearing by stating that a confidential source was involved. The confidential source was a wiretap.*

Concealing unlawful surveillance through the use of an appellation of confidential source or confidential informant is not something unique to the Wounded Knee cases, Indeed, over twenty years ago this Court faced the same situation in United States v. Coplon, 185 F.2d 629, 639 (2d Cir., 1950), cert. den. 342 U.S. 920 (1952).

---

* The record of the instant case is supported by memoranda of the judge of the Wounded Knee trials, Chief Judge Fred Nichol. These memoranda reflect his concern and anger over misrepresentations made by the FBI and the Justice Department. United States v. Banks, 383 F.Supp. 389 (D.S.D. 1974); United States v. Banks, 374 F.Supp. 321 (D.S.D, 1974).

The pattern of misrepresentation, whether intentional or inadvertent, is in no way limited to one or two isolated cases. See, e.g., Alderman v. United States, 394 U.S. 168 (1969); United States v. Hoffa, 307 F.Supp. 1129 (E.D.Tenn., 1970). The practice of misrepresentation has lead to sharp judicial criticism. United States v. Smilow, 472 F.2d 1193 (2d Cir., 1973); In re Korman, 486 F.2d 926 (7th Cir., 1973). However, the pattern does not seem to have abated. United States v. Banks, supra.

The cause of these misrepresentations is based in part on the irrational and haphazard record-keeping procedures of the FBI. Thus, in United States v. Schipani, 289 F.Supp. 43 (E.D. N.Y., 1968), aff'd. 414 F.2d 1262 (2d Cir., 1969), cert. den. 397 U.S. 922 (1970),

> ...various agents...testified that they were unaware of [electronic] surveillance.... Thus, [agent] Wilens, upon being shown an FBI report based in part upon electronic surveillance, testified that he would not be able to tell whether any particular entry in the report was derived from this method of surveillance and that he might make such information available to another agency without being aware of its source.
>
> 289 F.Supp. at 50.

Not only can misrepresentation result from information erroneously characterized by the FBI, but the information itself is filed in such manner as to minimize its being found. For example, the FBI keeps a card index only if an individual was the subject

of monitoring or, in the case of overhearings, if the individual identified himself by giving his/her full name.* If only a first name or a nick-name is given by the person overheard, the FBI keeps no index record.** Thus, in a normal telephone conversation with only first names being used, the FBI would have no record by which they could ascertain whether an individual was overheard.*** They are, therefore, perfectly free to utilize the information without ever revealing the source. The only way to obtain the information is to cross-examine the agent making the search. Whereas, the agent by affidavit could deny any record of surveillance, he would be forced to disclose wire-tapping if specifically asked about the source of the information. This record keeping problem points up the need for a hearing where there is a factual dispute as exists herein.

---

* Halperin v. Kissinger, No. 1187-73 (D.D.C.), Deposition of William D. Ruckelshaus, p. 18.

** Transcript of testimony of Special Agents Gary Owen Watt and Mason Smith, May 2, 1972, United States v. Ahmad, No. 14950 (M.D. Pa., 1971)

*** This is in contrast to the Internal Revenue Service which maintains files indexed by address where identity cannot be ascertained. See affidavit of Philip Litman submitted by the Government herein.

In addition to the record keeping problems, occassionally, as the Banks cases, supra, indicate, there are misrepresentations that are not inadvertant. Often FBI agents conceal from superiors the fact that information eminates from an unlawful source, often telling their superiors that the information results from a "confidential informant."* Also, it is not uncommon for agents to listen to tapes from which they gain investigative leads and then erase them.** Thus, unless a hearing were held, no information would be forthcoming from the files alone.***

---

* Affidavit of Michael E. Tigar, Esq., dated April 11, 1971, submitted in United States v. Ahmad, No. 14886 (M.D.Pa.). Once the records suggest such an informant, only the original agent may be aware of the wiretap and those who succeed him may remain unaware.

** Tigar affidavit, supra.

*** It is noteworthy that agents often conceal from prosecutors the fact that information is the product of electronic surveillance. See Memorandum For the United States in Schipani v. United States, 385 U.S. 372 (1966) (quoted in United States v. Schipani, 289 F.Supp. 43, 46 (E.D.N.Y., 1968).

The instant case provides a perfect example of the type of factual dispute which arises when a trial court permits a vague, conclusory affidavit to suffice as a foreclosure on the issue of surveillance.* It is not only "preferable" (Beverly v. United States, 468 F.2d 732 (5th Cir., 1972)) to have such hearings, but it is required unless the FBI is to have free reign over the control of surveillance. Where they are one of the parties to a case, as they were herein, with an interest of preserving their reputations and justifying the huge expenditure of money and manpower utilized herein, the final review of FBI activities cannot be left with the Bureau. It must rest with the judiciary. Any other course would leave the police unpoliced and the people unguarded.

---

* Aside from the "coincidence" of telephone call and subsequent arrest, other circumstances indicate that some form of electronic surveillance was utilized in this case. These facts include the FBI knowing "Inez'" first name but not her last name when interrogating defendant. This knowledge is the type gathered through wiretapping a phone conversation where last names are rarely used among friends. See also the affidavit of William M. Kunstler, defendant's attorney, filed in support of the Motion For Discovery and Inspection which alleges wiretapping as well as a physical break-in at defendant's residence.

C. The Court Below Erred in Refusing to Order the Government to Disclose the Name of the So-Called Confidential Source

During the examination of FBI Agent Behrends, out of the presence of the jury, defendant requested that the name of the so-called confidential source be disclosed. (Tr. 510) Defendant, by pretrial motion, had previously sought to have the name of any informers revealed, but the Government took the position that they were not obligated to disclose on the grounds that the informer was not a witness to the events in issue. (Response to Defendant's Motion for Discovery, par. 12) During the questioning of Agent Behrends, the Government added nothing to its earlier position. Indeed, they gave no reason at all for invoking the informer privilege.

Other than the Government's blanket statement that the confidential source was not a witness, no facts confirm such limited role for the source. On the other hand, the information actually in the Government's possession was so extensive that if the source were not a bugging device, it was certainly a participant in the events. Since the offense charged was conspiracy, the informer need only have participated in or witnessed a conversation to be more than a mere "tipster." In light of the defendant himself being the only participant to testify on his behalf on the crucial element of intent, the identity of the informer was crucial.

The Government's responses to the requests for disclosure were cavalier in their brevity, merely citing Roviaro v. United States, 353 U.S. 53 (1957) and United States v. Diogvardi, 332 F.Supp. 7 (S.D.N.Y., 1971).* Indeed, their oral argument was merely that a defendant has no right to know the means of his apprehension. (Tr. 492) At no time did the Government attempt to justify its refusal to disclose in terms consonant with the purpose of the privilege, i.e., danger to the lives of informers if their identities are revealed. (See Justice Clark's dissent in Roviaro, supra, as cited in United States v. Russ, 362 F.2d 843, 845 (2d Cir., 1966), fn. 3) Not only was there no attempt to justify the non-disclosure in these terms, but it was obvious that the defendant, John Van Orsdell, posed no threat to the informer's safety. Thus, no such justification could have been possible.

Since there was no threat to the informer, the only other ground available to the Government would have been the continuing role of the informer in law enforcement investigations. However, this justification also was not proferred by the Government. In short, the Government did not state that its refusal to disclose was due to any possible harm or detriment to the informe or to the Government. The Government merely took the position that the defendant was not entitled to know.

---

* A case in which defendant made absolutely no showing as to how the informer's identity might be relevant.

Frankly, the Government's position was outrageous. This Court has stated that "a trial is not a sporting event," and that the Government's responsibility is "to approach a request for the identity of its informant in a spirit of fair minded pursuit of the truth and not as a 'ride to the hounds' event." United States v. Russ, supra, 362 F.2d at 845, 846. While Russ involved an informant who merely introduced the defendant-drug seller to the prospective buyer, it is clear that the circumstances at bar involve information from a source that was not as transient as in Russ.

Roviaro, of course, calls for a balancing of "the public interest in protecting the flow of information against the individual's right to prepare his defense." John Van Orsdell had such a right to prepare his defense and a witness who would have corroborated his intent to expose the FBI rather than extort money would have probably led to an acquittal by the jury. Defendant's rights, however, must be balanced against the Government's interests according to Roviaro. But the Government asserted no such interests whatsoever! There was nothing on the Government's side of the scale. Their desire not to create a "rule" (Tr. 492) should have given way to defendant's specific needs. Defendant's question: "Would you please divulge the name of the confidential source?" (Tr. 510) should have been answered. It is clear that:

> Where the disclosure of an informer's identity, or of the contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> Roviaro, supra, 353 U.S. at 60, 61.

See also United States v. Roberts, 388 F.2d 646 (2d Cir., 1968). It is also clear that it is the "possible significance" of the informer's testimony which must be taken into consideration. Roviaro, supra, 353 U.S. at 62. Thus, where a source has a role as great as the one herein and where the "possible significance" of his testimony is so great, disclosure is required. Cf. Gordon v. United States, 438 F.2d 858, 875 (5th Cir., 1971).

Only the Government had access to the requested information. Unless there is a demonstrable need to withhold the evidence, the disclosure should be forthcoming.* Neither the U.S. Attorney nor the FBI should have the final say on disclosure. Cf. Alderman v. United States, 394 U.S. 165 (1969). But this responsibility must rest squarely with the judiciary. Defendant was entitled to know the nature of his apprehension, the extent of wiretap overhearings, and the identity of any informer. It was error to so deny him.

---

* See, for example, the Freedom of Information Act, as Amended, 5 U.S.C. 552(a)(4)(B), which requires that an agency disclose requested information unless the material requested is somehow exempt. The burden is on the agency to justify the exemption. 43 U.S.L.W. 145.

CONCLUSION

The "presumption" (Tr. 492) that defendant's arrest came as a result of his phone call from Jack Anderson's office was never dispelled by the Government; the FBI only denied direct surveillance. Indeed, their record-keeping procedure (unlike that of the I.R.S.) is such that it is difficult for them to deny anything more than that. A hearing was necessary to fully explore the issue. Claiming that there was no wiretap but a "confidential source," the Government claimed that defendant was not entitled to know the identity of their source. Without any justification at all for their position, the Government wanted to be the final arbiter of discovery. Without impugning in any way the sincerity of the office of the U.S. Attorney, the prosecution can not have the last word. The defendant-appellant should have been permitted to explore the almost-certain illegalities that lead to his conviction. Unless the judiciary requires full disclosure in such cases, the courts become unwitting parties to the illegal conduct. Gelbard v. United States, 408 U.S. 41 (1972).

John Van Orsdell attacked the FBI in the way he thought best. They responded in kind. They were the real parties to

this dispute. Whereas, justice demands that the courts, not the FBI and not the U.S. Attorney, oversee and control the FBI, the instant conviction resulted from the lack of such control. A remand for further proceedings is required.

Respectfully submitted,

MARK LEMLE AMSTERDAM
12 Bedford Street
New York, New York 10014
212-675-6569

Attorney for Defendant-Appellant

Dated: New York, New York
April 30, 1975

APPENDIX

PW:slc
4-335

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- v - : INDICTMENT

JOHN VAN ORSDELL, : 74 Cr. 193 (AB)

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

The Grand Jury charges:

1. From on or about the 25th day of May 1973, up to and including the 10th day of October 1973, in the Southern District of New York and elsewhere, JOHN VAN ORSDELL, the defendant, and Robert Greenman and Inese Gerke, named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, United States Code, Section 876.

2. It was a part of said conspiracy that JOHN VAN ORSDELL, the defendant, would draft and mail a copy of a letter, a copy of which is annexed hereto and incorporated herein, to Robert Parker, The Concord Hotel, Kiamesha Lake, New York 12751, containing a threat of injury to the guests of The Concord Hotel, with the intent to extort money from Robert Parker and The Concord Hotel, in violation of Title 18, United States Code, Section 876.

OVERT ACTS

In furtherance of said conspiracy and to effect

APPENDIX 1 (A1).

the objects thereof, the defendant did commit the following overts acts in the Southern District of New York:

1. On or about May 26, 1973 JOHN VAN ORSDELL, the defendant, and co-conspirator Robert Greenman drove to the Concord Hotel.

2. On or about June 29, 1973 JOHN VAN ORSDELL, the defendant, wrote a letter, a copy of which is annexed hereto and incorporated herein.

3. On or about June 30, 1973 JOHN VAN ORSDELL, the defendant, and co-conspirator Robert Greenman mailed a copy of the letter referred to in overt act 2 above, from New York, New York to Robert Parker, The Concord Hotel, Kiamesha Lake, New York 12751.

4. On or about July 3, 1973 JOHN VAN ORSDELL, the defendant, and co-conspirator Robert Greenman, using false names, rented a safe deposit box at the East New York Savings Bank, New York, New York.

5. On or about July 6, 1973 JOHN VAN ORSDELL, the defendant, and co-conspirators Robert Greenman and Inese Gerke went to the vicinity of Grand Central Station, New York, New York.

6. On or about July 6, 1973 JOHN VAN ORSDELL, the defendant, and co-conspirators Robert Greenman and Inese Gerke went to the East New York Savings Bank, New York, New York.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of June 1972, in the Southern District of New York, JOHN VAN OSDELL, the defendant, unlawfully, wilfully, knowingly, and with intent to extort approximately $320,000 from Robert Parker and The Concord Hotel, did deposit in an authorized depository for mail matter to be delivered by the United States Postal Service and cause to be delivered by the United States Postal Service according to the direction thereon, a letter, a copy of which is annexed hereto and incorporated herein, addressed to Mr. Robert Parker The Concord Hotel, Kiamesha Lake, New York 12751 and sent during a threat to injure the persons of one hundred guests of said hotel by surreptitiously causing said guests to ingest quantities of LSD-25.

(Title 18, United States Code, Sections 876 and 2.)

Foreman

PAUL J. CURRAN
United States Attorney

STATUTES

18 U.S.C. 876

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnaped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

~~JUDGE BAUMAN~~ JUDGE WYATT

74 CRIM. 193 KNAPP J

DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Frank B. Wohl, AUSA
JOHN VAN ORSDELL	264-6292
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
01)								
Fine,			1/16/75	Kuntsler	√	–		
Clerk,			1/21/75	Trial			√	–
Marshal, √								
Attorney,								
~~Commissioner's Court~~ 18								
~~Witnesses~~ 371,876								
Consp. to commit extortion(Ct.1)								
Extortionate letter(Ct.2)								
(Two Counts)								

DATE	PROCEEDINGS
2-22-74	Filed indictment. (Superseding 73 Cr 962) Assigned to Bauman,J.
2-26-74	Filed Govt. notice of readiness for trial.
3-4-74	Referred to Judge Bauman, POLLACK,J.
3-12-74	Deft. (Atty. Not present) Court directs entry of Plea of Not Guilty. Motions Ret. 4-10-74 at 9:30 a.m. Defts. bail limits extended to include. Mass. Conn. N.Y., N.J., Penn.De.,R.I. & Dist. of Columbua. BAUMAN,J.
Apr.26-74	Filed deft. affdvt and notice of motion for discovery and inspection.
Oct 31-74	Action Reassigned to Knapp,J.

A 3

KNAPP, J.

PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
Filed deft.'s notice of deposition of Robert J. Boyle on 11/9/74.		
Jury trial begun before Knapp,J.		
Trial cont'd,		
" "		
" "		
" "		
" "		
" " & concluded, Jury finds the deft. guilty on all counts. P.S.I. ordered. Sentence adj. to 1-10-75 at 9;30 A.M. Bail cont'd. Knapp,J.		
Filed transcript of record of proceedings, dated 11/6-7-11-12/74		
Filed transcript of record of proceedings, dated 11/13-14-15/74		
Filed deft.'s notice of appeal from judgment of 1/10/75. mailed notices.		
Filed JUDGMENT -(atty. present) deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of TWO (2) YEARS on count 1 and FIVE (5) YEARS on count 2. Execution of sentence of imprisonment on count 2 is hereby suspended and the deft. is placed on probation for a period of FIVE (5) YEARSto commence upon the expiration of the term of imprisonment imposed on count 1. Knapp,J. issued all copies.		
Filed deft.'s motion re: ~~leaves~~ for deft. to proceed in forma pauperis in the prosecution of his appeal,etc.		
Filed memo.-end. on motion docketed 1/17/75. Motion granted. Knapp,J. mn		
Filed Transcript of rec'd of proceedings dated 1/10/75.		
Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.		

2:15 p.m.

(In open court; jury present)

THE CLERK: The judge is about to charge the jury. Any spectators wishing to leave must leave now or remain seated until the charge is completed.

CHARGE OF THE COURT

(Knapp, J.)

THE COURT: Ladies and gentlemen, as a preliminary matter, I several times reproved Mr. Van Orsdell for dropping his voice, and it is a habit I have, too. If at any time in my instructions I drop my voice so you can't hear or have difficulty hearing, please indicate to me it is happening, and I will take it as a favor if either counsel will let me know if that happens. It is unintentional, I assure you.

I plan to try an experiment in the form of this charge. Usually, I outline the general rules of your conduct and then go to the specific charge and then to the form of the verdict. I thought it might be clearer in this case if I reverse that whole process. Therefore, I will start off with the questions that are going to be submitted to you for your verdict.

You can see there are four questions there. The first question is: is the defendant not guilty of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE NEW YORK, N.Y. CO 7-4580

any crime. We start out with that presumption. It is called the presumption of innocence and I will have more to say about that later. It is up to the Government to establish to your satisfaction beyond a reasonable doubt exactly what, if any, crime the defendant is guilty of. If they fail in that burden you answer the first question "yes" and that's the end of it.

The next three questions are whether the defendant is guilty of any of the three specific crimes that are alleged against him. I will say right now you have to either answer No. 1 "yes" or you have to give a "yes" or "no" answer to each of 2, 3 and 4, in order for the verdict to be complete. A "yes" answer to No. 1 would be a complete verdict. If you answer "no" to No. 1, your verdict would not be complete unless you answer each of the other three.

Now let's look at Question No. 2, the first of the possible guilty verdicts. The question it asks is: is the defendant guilty of sending a threatening letter? Now, just let me read to you the applicable statute on that in response to that question.

The statute provides, "Whoever knowingly deposits in any post office to be sent or delivered by the postal service any communication containing any threat to injure the person of the addressee or of another shall be guilty

of a crime." That is the first statute which the defendant is accused of violating.

The next question is, is the defendant guilty of sending such a letter with intent to extort money? The applicable statute on that, in effect says:

"That anyone who knowingly so deposits" -- such a letter as I have just described -- "with intent to extort from any person any money or any other thing of value shall be guilty of the crime of extortion."

That is the statute that governs the second question, guilty of sending such letter with intent to extort.

And the third accusation against him -- incidentally this isn't the order in which they are in the indictment. This is the order in which I'm submitting it to you -- charges him with the crime of conspiracy. The question you must answer is: is the defendant guilty of conspiracy to commit one or both of the above two crimes. The conspiracy statute reads as follows:

"If two or more persons conspire to commit any offense against the United States, and one or more of such persons shall do any act to effect the object of the conspiracy, each such person is guilty of the crime of conspiracy."

Now, those are the three statutes the defendant is charged with violating. Let me just go over them in a

a little more detail as to exactly what they mean.

With respect to the first statute, sending a threatening letter, the first thing to consider is exactly what is a threat. I don't really have to explain that word. It is a common, garden-variety, English word. How are you going to decide whether this particular letter is threatenin Decide whether it conveyed to the recipient the idea that unless he followed the instructions in the letter something would befall him or another person. In this case, the persons allegedly endangered by the letter were the hotel guests. So much for the threat.

The indictment specifies injury to the person of those threatened. That means you must consider whether the injury threatened, namely, the placing of LSD in the drinking water or food should, in your judgment, be defined as an injury to the person of the guests involved. Neither attorney seems to discuss that subject, so I just leave it to your good judgment.

Finally on this subject, a threat, to be criminal, must be seriously intended, so you must also consider whether the letter as a whole, together with all the circumstances in which it was received, or intended by the sender to be received would the recipient, in this case, Mr. Parker, reasonably be expected to take the letter

seriously and become fearful that the threat might be carried out, and cause personal injury to someone, the hotel guests in this case, unless he followed the instructions contained in the letter. Whether in fact he did take the letter seriously and become fearful of such personal injuries to the hotel guests is beside the point, except to the extent you may consider his actual reactions to have been indicative of what the sender might reasonably have anticipated.

The threat does not have to name any particular hotel nor the guests in the hotel, nor is it material whether the content of the threat came to the attention of any guest, nor is it material whether or not the defendant in fact intended to carry out the threat if his demands were not met.

So then, to recapitulate, the answer to the second question-- did the letter contain the threat -- was that a threat to the person of the hotal guests and, if so, was it sent with the purpose of instilling fear in the recipient, If your answer to ach of those questions is "yes" beyond a reasonable doubt, you may check "yes" in answer to Question No. 2.

If you have any reasonable doubt as to any of those three propositions, your answer to that question should be no.

You will notice that the sender's intent insof as what he hoped to gain is concerned has no bearing on the answer to the question we have just been discussing. It is wholly immaterial to that question whether the defendant's ultimate purpose was to obtain play money, real money or no money at all.

MR. KUNSTLER: Judge, I think you made an erro when you said if they find that there is no reasonable -- the prosecution has not proved beyond a reasonable doubt any of the aspects of the first thing. You said their answer should be no. I think their answer should be yes o number 1.

THE COURT: I am talking about number 2.

MR. KUNSTLER: Pardon me. Then I withdraw th

THE COURT: I'm glad you interrupted, because you misunderstood, maybe one of them did too.

Getting back to the issue of intent: The onl way in which the defendant's intent is relevant to the ans to Question 2 is whether the defendant intended to put Mr. Parker in feat in the manner I have just discussed.

"However, the defendant's purpose of intent essential to the next question, number 3. With respect to that question, when the crime involved is extortion, such a crime is only committed if the defendant acted with

the purpose and intent of obtaining money and by this I mean real money, not play money, as a consequence of sending that letter. Of course, if his intention was to obtain money, it is wholly immaterial what he intended to do with it; whether he intended to spend it on himself, making a movie or freeing Timothy Leary. If he intended to obtain money from the Concord Hotel or, rather, if you are satisfied beyond a reasonable doubt that he so intended, and again I say real money, not play money, then you should answer yes to question 3, and convict the defendant of the crime of extortion.

Now, if you answered yes to one or both of questions 2 and 3, you should go on and consider question 4, is the defendant guilty of the crime of conspiracy. Let me again read the statute defining conspiracy:

"If two or more persons conspire to commit any offense against the United States"-- In this case either extortion or sending a threatening letter -- "and one or more such persons does any act to effect the object of conspiracy, each is guilty of the crime of conspiracy."

What then is a conspiracy? In layman's language, a conspiracy is nothing more or less than a common enterprise entered into for the purpose of committing a crime. We daily see people engaged in common enterprises. They may be

formal or informal. If three of you should decide to have a meal together, that would be a common enterprise, informal in nature. On the other hand, the conduct of this trial is a common enterprise of the most formal character. What turns a common enterprise into a conspiracy is that its objective is to commit a crime, in this case, the crime of s a threatening letter or extortion. So, your first question on conspiracy is, did the defendant embark upon a common enterprise with Robert Greenman or Inese Gerke to commit one of these crimes. If so, did any of them perform an act in furtherance of the conspiracy. As you recollect, the statute I read you makes the condition that one or more of the parties does an act to effect the object of the conspiracy. That means that under the law it is no crime to sit around and talk. Someone has to do something in furtherance of any unlawful plan that might have been agreed upon. Further, the law says the indictment must specify one or more such acts and that you must find beyond a reasonable doubt that the act specified did in fact occur The indictment in this case lists a total of six overt acts and you are free to look at the indictment. However, I will only discuss one of them: overt act number 3. The indictme alleges that on or about June 30, 1973, the defendant and Robert Greenman mailed a copy of the Parker letter from New York to Mr. Parker at the Concord

Hotel. Now, it may seem odd to you that I am submitting this as a question of fact in view of the fact Mr. Van Orsdell himself testified to it. Nonetheless, the law says regardless of who may have said what, you must find as a fact that the letter was mailed. Perhaps more importantly, you must find beyond a reasonable doubt that it was mailed in furtherance of the conspiracy alleged in the indictment.

To recapitulate, if you find that the defendant had a common enterprise -- any way you want to express that, there is nothing magical about the word enterprise -- with Mr. Greenman or Miss Gerke or both, that the purpose of the common enterprise was to send a threatening letter, or extort money and either Greenman or the defendant actually mailed a letter for that purpose, you may convict the defendant for the crime of conspiracy.

Incidentally, as a general proposition applicable to this case as all cases, it doesn't make any difference whether the defendant does something himself or gets someone else to do it for him. Therefore, for example, it is wholly immaterial both from the point of view of your answer to the conspiracy question or to any of the other questions, and I am submitting to you whether Mr. Greenman mailed the Parker letter or whether the defendant Van Orsdell himself

mailed it. So much for the crimes of which the defendant is charged. Now let's turn to the rules which guide your deliberations in deciding whether any or all of those cri have been established to your satisfaction been establish to your satisfaction beyond a reasonable doubt.

In the first place, let me remind you what I said at the outset. The finding of facts is exclusively your function and a function in which I play no part what I don't think I need to elaborate on that. I went into i in some detail at the beginning. However, I just want to raise it now because I want to caution you that in expres any rule of law for guidance is not intended by me to giv you any indication of how I think any of those rules or definitions should be applied by you.

If by chance I have failed in my purpose and conveyed to you some idea that I have an idea, please do me the favor of ignoring whatever you think I may think. Don't compound my error by paying the slightest attentio to any idea you may think I have.

Of course, a corollary to that is you should not concern yourselves with the duties imposed upon me. One of those duties is to decide what, if any, punishmen should be inflicted upon this defendant should you find him guilty. The law says you are not to concern yoursel

with that question. I must trust you to deal with the facts and you must trust me to deal with any responsibility your verdict may impose upon me.

Coming back to your fact-finding function, incidental thereto is the rule that you are the exclusive judges of the credibility of all of the witnesses who appeared before you. There is no mystery about how a juror should judge the credibility of a witness. Every day in our lives we are called upon to judge the credibility of people who talk to us. We hear talk by our children, by our parents, relatives, business associates, people who want to sell us things, people to whom we want to sell, politicians and casual acquaintances. Every time we hear something said, at least anything of the slightest consequence, we instinctively, or deliberately, go through the mental process of deciding whether to believe it or not. In the course of our lives we develop certain antennae -- whether consciously or unconsciously -- for evaluating the reliability of what is said to us. Your function as jurors is simply to use those antennae in evaluating the witnesses who testified before you.

The theory of the jury system -- to which, as I have told you, I heartily subscribe -- is that a sounder result is likely to be achieved if 12 persons

pgh3

pool the antennas developed by our respective life experiences rather than if one person -- a judge -- had to decide the question himself. If I had to decide the questions in this case, I would only have one set of life experiences -- my own -- to go by. You have 12 such experiences. Of course, this system only works if you open-mindedly discuss the various problems of credibility amongst yourselves so that the life experiences of each of you will be brought to bear on the problem.

The law lays down certain guidelines for your consideration in this process, and it is my duty to discuss them with you. Most of them, as you will see, are just distillations of our common sense.

The first of these is that you should consider whether any witness before you has an interest in the outcome of the case. Obviously the defendant has an interest in the outcome of the case. Nothing could be clearer than that. On the other hand, the defendant contends that both Robert Greenman and Inez Gerke have an interest, and that all the FBI agents who testified had an interest. You heard the arguments on that, and whether and to what extent they did have an interest is for you to determine.

With respect to Robert Greenman and Inese Gerke, they both frankly told you that an important consideration

in cooperating with the government was the hope of avoiding prosecution themselves, which hope, as they told you, has been realized. Whether this hope on their part in any way caused them to present their testimony in a manner they thought would be favorable to the government is entirely for you to judge.

The mere fact that a witness has an interest, be he a defendant, an FBI agent, or a person arrested with the defendant, does not, of course, necessarily mean that he or she is not telling the truth. If that were the rule you couldn't believe anybody, because in the general experience of life, unless people have an interest in what they are saying they usually keep quiet. It is for you to determine what, if any, effect any interest you may find that a witness possessed had upon the truthfulness of his or her testimony.

With respect to Mr. Greenman and Miss Gerke, there is another guideline which comes into play. According to their own testimony they are obviously guilty of the very crimes of which the defendant is accused. The law calls such persons accomplices. The law says you are entitled to act on the testimony of such a person, but that you must subject it to special scrutiny.

That, as I say, is common sense.

pgh5

Obviously any person subject to prosecution for a crime either has, or thinks he has, an interest in ingratiating himself with the government by testifying on the government's behalf. Obviously it is more comfort to be on the witness stand than in the defendant's box.

Obviously the law says, and it is plain common sense, you should take those factors into account when weighing the testimony of a witness, but the law also says if after having taken those factors into account you come to the conclusion that the witness has given truthful factually accurate, testimony, you may act upon it exactly as you would upon that of any other witness.

Another ruling for your guidance, and this is more than guidance really, it is the rule of law, is that the indictment in this case has no probative value whatever You remember, I raised that question when you were being selected. It is just a procedural device for bringing the defendant before you for trial. It has no more probative value than if you had seen Mr. Buchwald sit down before you with a stenographer and dictate the allegations of the indictment out of his own head. I repeat, it is merely a procedure by which is brought before you questions of whether the accusations set forth have been established to your satisfaction beyond a reasonable doubt.

That brings us to the term "reasonable doubt". When you analyze it, it is common sense. In a civil case, all the plaintiff has to do is establish his case by what is called a preponderance of evidence, which boils down to mean it is more likely than not that what the plaintiff has asserted is true. If it is more likely than not, the jury is entitled to give the plaintiff its verdict. That may be fine, and, indeed, it is fine, when all that is involved is whether A should pay B some money.

But the purpose of the government bringing a criminal case is to authorize the court to commit the defendant to jail. Whether I do that, that is my responsibility. The verdict is designed to give me that authority. Our liberties wouldn't be worth much if it would be permissible to put a man in jail just because guilt seems more probable than innocence.

Therefore, the law says that guilt must be established beyond a reasonable doubt.

There are two words in that definition, "reasonable" and "doubt". The meaning of doubt is self-apparent. The word "reasonable" is, in the last analysis, equally self-definable. It means a doubt for which you can give a reason. It isn't just a fanciful doubt or an excuse for ducking a duty. No one likes to be in the

pgh7

position of convicting a fellow human being, but the law would also be in a sorry state if jurors wouldn't take the responsibility of finding guilt if it were established beyond a reasonable doubt. Also, the reasonable part of the term goes to the essence of jury deliberation.

If you have a doubt and express a reason for it and another juror has no doubt, your expression of the reason for your doubt will probably do one of two things. It will either enable your fellow juror to demonstrate to you that your doubt is unreasonable, or it will enable you to demonstrate to him, or her, that he, or she, should have a doubt.

If you express your doubts, or lack of them, to each other, you should be able to resolve them one way or the other. Of course, a doubt, like everything else in this case, a reasonable doubt, must be based on the evidence, or lack of evidence, not on something you may have heard outside.

It has to be based on evidence, or lack of evidence, otherwise how can you discuss it with your fellow jurors? All you have in common with each other is what you have heard and seen in this courtroom, and it is that upon which you must base your deliberations.

In this connection, I may point out that while

pgh8

it is your duty to discuss your doubts with each other and to listen to each other's views, you should adhere to any conscientious opinion you might hold and not give it up merely for the sake of unanimity. I don't think there is anything I can add to that.

The law simply requires you to do your best to convince your fellow jurors of the correctness of your views and at the same time to listen with an open mind to theirs and to make a conscientious effort to reach a result which conforms with the conscientious belief that each of you holds.

Obviously, I assume you are not going to start unanimous. Unanimity comes from discussion amongst you, exploration of your doubts or lack of them, discussion of the evidence or lack of evidence upon which those doubts or lack of them may be based. That is how unanimity is achieved.

Before I leave the question of reasonable doubt, it being so important, let me read you another definition that is given by a judge for whom I have great respect.

"It is a doubt," he says, "based on reason, which arises from the evidence or lack of evidence in the case. It is a doubt that appeals to your reason, to your judgment, your common understanding, and your common

pgh9

sense. Such a doubt as would cause you to hesitate to act in matters of importance in your daily lives. But it is not caprice, whim, or speculation. It is not a doubt a juror might conjure up to avoid the performance of an unpleasant duty. It is not sympathy for a defendant Let me repeat, it is a reasonable doubt."

That ends the quotation.

Closely related to the doctrine of reasonable doubt is the concept of the presumption of innocence. That means that the government has the burden of proof in this case and that such burden never shifts.

I have told you the defendant doesn't have to prove anything. The point is that the presumption of innocence continues in his favor throughout the entire trial and remains there in the jury room until you have finally resolved it, if you ever do, by a verdict of guilty.

It means this: Right up to the last minute your discussions should include the proposition that the governm has a burden, and if the government hasn't overcome the burden, or, rather, sustained it, that, in itself, is the basis for a reasonable doubt.

Now let me turn to the question of character evidence. Therehas been testimony here as to the previous

pgh10

good character or reputation of the defendant. You may consider such evidence of character or reputation together with all other facts and evidence in the case and determine the guilt or innocence of the defendant. Evidence of good character may, in itself, create a reasonable doubt where without such evidence no reasonable doubt would have existed. But if on all the evidence, including the evidence of good reputation, you are satisfied beyond a reasonable doubt that a defendant is guilty, the mere fact that he had previously enjoyed a reputation for good character does not justify or excuse the offense and you should not acquit a defendant merely because you believe he had previously been of good repute. The testimony of a character witness is not to be regarded by you as expressing the personal opinion of the defendant's character of the witness' opinion as to the guilt or innocence or the defendant. The guilt or the innocence of the defendant is for you and you alone to determine.

So much for what is in the case. Let me discuss a few things that arenot involved in the case.

In the first place, the FBI is not on trial in this case. Whether they are good, bad or indifferent is wholly beside the point. Of course, if you find that any agent had an effect on any witness in this case, that is of course foryou to determine; but otherwise, whether their acts are good, bad or indifferent is wholly immaterial.

Another thing that is not in this case is the life style or personality of the defendant. Things in his background have been brought out which may, in your judgment, have a bearing on whether or not he is guilty of the crime charged in this indictment. It should have no other effect upon your deliberations whatever. Whether you approve or disapprove of his life style, whether you admire him or dislike him, that is wholly immaterial to your determination in this case. If evidence about his background is deemed relevant to his guilt, you may consider it. Anything else, good, bad or indifferent, you should ignore.

Another thing that is legally insignificant is his motive in doing the thing except as it affect his intention to violate the law in the manner in which I have

expressed. His motive may be good, bad or indifferent. The question you have to decide ultimately: Did he act with intention to violate the law as I have tried to define it to you?

Now, it is my practice at this point to excuse you for a time while counsel for either side makes suggestions or criticisms of what I have said. Having heard those suggestions and criticisms, I will call you back and make such changes as I deem appropriate. I will give you housekeeping instructions and submit the case to you for your consideration.

For the last time I ask you not to form or express an opinion.

I hope that I have given a charge that is substantially accurate, but it is quite possible that one counsel or the other might call something to my attention and it's quite possible that it might make a material difference in something I have said.

So just keep your minds open for the last time. When you return, will the alternates bring with them anything they want to take home, their coats, et cetera. It is my intention to have you stay and let the jury go back to the jury room.

(The jury left the courtroom.)

THE COURT: First Mr. Kunstler.

MR. KUNSTLER: Judge, I would ask you to add to your charge my No. 5, which is if the evidence before you as to any of the crimes charged in the indictment is capable to two inferences, one of which is consistent with guilt and one which is consistent with innocence, you must adopt the one consistent with innocence and acquit the defendant of that charge.

Secondly, you made no mention to the jury that in order to find the defendant guilty under the substanti counts, the substantive charges, that they must find from the evidence, threatening to use LSD is a threat to injure the person of the addressee or not. You indicated that counsel only in their summations did not do anything about that, but I think that since that is so important in this case and was the grounds of my post-prosecution case motion and motion made at the end of the entire case, they ought to know that that's one of the elements of the crime and that they have to find that the use of LSD is a threat to injure the person of the addressee o another.

I gave two charges --

THE COURT: This what I said: That means that before you can find where this letter fits in the charge

you must consider the injuries threatened, namely, the placing of LSD in the drinking water or food, should, in your judgment, be defined as an injury to the person of the guests involved.

It seems to me that answers your question quite clearly.

MR. KUNSTLER: I was asking for it to be reiterated because I thought it might have slipped by. I would ask you to give 6 and 7 in addition to what you have done.

THE COURT: I think I have said enough.

MR. KUNSTLER: Lastly, Judge --

THE COURT: If Mr. Buchwald has any fear for his record, don't hesitate to speak up.

MR. BUCHWALD: I think the charge was clear, your Honor.

MR. KUNSTLER: Then I would ask you to give my No. 10:

If you find that the letters and telegrams sent by the defendant to the Concord were threats and you further find they were intended as a hoax, you must acquit the defendant.

I took that from a Tenth Circuit case two years ago. There was no mention of "hoax" to the jury. If they

did find it was a hoax, particularly on the first or the second substantive charge, your No. 3, or even No. 2 - they ought to at least know if they do come and find it was a hoax they must acquit the defendant. They ought to know that.

THE COURT: I don't think the word "hoax" has to be used. Doesn't what I have read meet your question?

MR. KUNSTLER: I would rather have the word "hoax" used. That's the reason I framed No. 10 as it was.

I would ask your Honor to give No. 10 using the word "hoax."

Let me put it this way: That the word "hoax" means essentially to have it not understood as a serious threat or what have you. I like No. 10 better than I like your Honor's charge. That's why I'm asking for No. 10.

THE COURT: Let me have your requests.

Anything else?

MR. KUNSTLER: That's all.

MR. BUCHWALD: I would have comments on Mr. Kunstler's proposal of No. 10, which I think would clearly be inaccurate as a matter of law as to No. 2 on your sheet. While it's argumentably accurate as to No. 3 on the sheet, your Honor has made clear if they were talking

about fake money as opposed to real money -- and that's the substance of the hoax alleged -- that's not sufficient to convict under No. 3.

So I think it's covered by No. 3 already in your Honor's charge and it would be an absolutely incorrect charge as to No. 2.

THE COURT: I'll give them the word "hoax." I think you are right.

MR. KUNSTLER: I would accept that. I think No. 2 indicates that there is no intent necessary, one way or the other. So you could say No. 2, even intending it to be a hoax it could still be a threatening letter.

I would submit it pertains to No. 3.

THE COURT: Anything else?

I assume that nobody has any objection to their getting any exhibits that they want?

MR. KUNSTLER: No, your Honor.

THE COURT: I'll tell them about unanimity and I'll tell them about reading back testimony.

Anything else?

MR. KUNSTLER: I would rise and get my exhibits together.

THE COURT: Do that when they go out.

Anything else?

MR.BUCHWALD: No, your Honor.

MR. KUNSTLER: No, your Honor.

MR. BUCKWALD: Will the jury be provided with a copy of the indictment?

THE COURT: There is no objection to giving them a copy of the indictment, is there?

MR. KUNSTLER: No objection.

Before they come in, we feel that maybe they don't understand and maybe you could make this clear: If they find guilty, say, on No. 2, that does not necessarily mean they must find guilty on No. 4, for example.

If they were to find -- I have a feeling it sounded -- Mr. Van Orsdell understood it that way -- if they find him guilty --

THE COURT: It does not do him much good, does it?

I'll clear that up.

MR. KUNSTLER: Thank you.

(Jury present)

THE COURT: Just a few clarifications.

In the first place, both counsel in their summations used the word "hoax." I didn't use the word "Ho and some counsel that I may have intended denegrate the word.

As to Question No. 3, the extortion, if it was a hoax and it was not intended to extort money, the answer to Question No. 3 should be "no." That has nothing to do with Question No. 2.

There was some thought this sheet might not be completely clear. I'll say it again: If you answer Question No. 1 "yes," that means the defendant is not guilty and that's the end of the whole matter.

Each of the other questions must be independently answered and simply because you answered either 2 or 3 "yes," that doesn't mean you have to answer 4 "yes." You have to consider each question separately.

As far as I can see, ifyou answered 2 "no," that would end your arguments. That's the way it seems to me.

But, in any event, each answer has to be answered under the rules as I laid them down.

You may have a copy of the indictment if you wish and it will be sent in to you. If you wish any exhibits, name them by number and description and they wil then be sent to you.

If you want to hear any witness' testimony, just send in a note describing what you want to hear and it will be read back.

Sometimes jurors think that they can get the ac
transcript. The procedure is not to let that happen.
I will tell you why. The whole theory of jury deliberat
is that you work as a unit. If I send in transcripts
what tends to happen, people take different parts of
it off by themselves and break up into little groups
instead of working as a unit. Therefore, even though it
burdensome, if you want to hear testimony you have to
send word, let us know what you want, and we will get it
call you back and you can listen to it read to you.

Your verdict must be unanimous. There is no
such thing as a nonunanimous verdict in federal criminal
practice.

You can ask any question you want. Just have
the foreman write a note. If you didn't understand my
charge or any part of it have no hesitancy in telling
me. You are laymen and I'm a lawyer and I'm used to
talking to lawyers. I may very well have said this in
cryptic language that you didn't grasp. If there is any
misunderstanding of what I said, don't hesitate to have
it repeated to you. If there is anything you want to
find out, send in a message.

One thing, don't say in the message at any tim
how you stand. I'll tell you why I say that. You may

be 10 to 2, one way or the other, and it may be my obligation at that time to reason with you how you can break the deadlock. Well, if you tell me who is 10 and who is 2, there is no method of language I can conceive which will permit me to urge you to reach agreement without convincing the 2 that I am on the side of the 10. If I don't know, then there is no danger.

It's quite clear that we are only trying to achieve unanimity. So one piece of information I don't ever want to know is how you stand at any given time.

Ladies and gentlemen, I have no questions. I am submitting this case with complete confidence that you will return a verdict under the law and your conscience.

(At 3:05 p.m., the jury retired to commence deliberation.)

(The two alternate jurors were excused.)

AFFIDAVIT

I, William A. Harwood, after having been duly sworn, do hereby depose and state the following:

I am a Special Agent of the Federal Bureau of Investigation and am currently assigned as a Supervisor at Federal Bureau of Investigation Headquarters in Washington, D. C.

I have made a careful and diligent search of the appropriate records of the Federal Bureau of Investigation and have determined that no one identifiable as John Calvin Van Orsdell, born August 23, 1933, was the subject of a direct electronic surveillance by the Federal Bureau of Investigation.

John Calvin Van Orsdell participated in a telephone conversation on July 6, 1973, with Special Agent Margot P. Dennedy, which was consensually monitored. The conversation related to an extortion case which was under investigation by our New York office.

The results of the aforementioned overhearing were included in a report of this Bureau dated July 25, 1973, at New York entitled "John Calvin Van Orsdell; Robert Greenman; Mr. Robert Parker; The Concord Hotel, Kiamesha Lake, New York - Victim; Extortion." Copies of this report have already been disseminated to the Criminal Division, Department of Justice.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

I have determined from this review that other than the above, John Calvin Van Orsdell was never monitored by any other electronic device of the Federal Bureau of Investigation nor was an electronic surveillance maintained on premises which were known to have been owned, leased, or licensed by him.

WILLIAM A. HARWOOD
Special Agent Supervisor
Federal Bureau of Investigation

SUBSCRIBED AND SWORN to me
this 11th day of October, 1974.

NOTARY PUBLIC
My Commission [illegible]

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

AFFIDAVIT

I, William A. Harwood, after having been duly sworn, do hereby depose and state the following:

I am a Special Agent of the Federal Bureau of Investigation and am currently assigned as a Supervisor at Federal Bureau of Investigation Headquarters in Washington, D. C.

Reference is made to my affidavit dated October 11, 1974, concerning John Calvin Van Orsdell, born August 23, 1923.

I hereby furnish the following supplemental affidavit.

It was not my intention to equivocate in any manner whatsoever through the use of the word "direct" in paragraph two of my original affidavit dated October 11, 1974.

I previously made a careful and diligent search of appropriate records of the Federal Bureau of Investigation and determined that no one identifiable as John Calvin Van Orsdell or anyone by his known aliases, including Crayola, was ever monitored by any electronic device of the Federal Bureau of Investigation.

WILLIAM A. HARWOOD
Special Agent Supervisor
Federal Bureau of Investigation

SUBSCRIBED AND SWORN to me
this 22nd day of _____, 1974.

NOTARY PUBLIC My Commission Expires Dec. 14, 1978

United States
of America

Department of the Treasury
Bureau of Alcohol,
Tobacco and Firearms
Washington, D.C.

Date: September 25, 1974

~~I hereby certify that the annexed~~
I, Joseph F. Kelly, Acting Assistant Director (Criminal Enforcement), Bureau of Alcohol, Tobacco and Firearms, do certify that Donald Zimmerman, Chief, Intelligence Branch, Special Programs Division, Bureau of Alcohol, Tobacco and Firearms, whose name appears on the attached statement is and was at the date of statement, custodian of the electronic surveillance records maintained by the Bureau of Alcohol, Tobacco and Firearms; that I am familiar with his signature; and that I have examined his signature and find it to be his true signature.

Joseph F. Kelly, Acting Assistant Director (Criminal Enforcement), Bureau of Alcohol, Tobacco and Firearms

~~In witness whereof,~~
Thurman W. Darr
In witness whereof,
I have hereunto set my hand, and caused the seal of the Department of the Treasury to be affixed, on the day and year appearing above.
By direction of the Secretary of the Treasury.

Thurman W. Darr
Chief, Technical Services Division

ATF F 25 (7-73)

Washington)
District of Columbia)

I, Donald L. Diseroad, having been duly sworn, depose and state:

I am the Manager of the Organized Crime Division, Postal Inspection Service, U. S. Postal Service, Washington, D. C. In that capacity I have access to all records of electronic surveillance conducted by the Postal Inspection Service.

This affidavit is submitted in accordance with an inquiry dated September 18, 1974 from Mr. Carl W. Belcher, Chief, General Crimes Section, Criminal Division, Department of Justice. Copies of Mr. Belcher's June 19, 1974 inquiry and our response of June 21, 1974 are attached to and made part of this affidavit.

I have caused a search to be made of Postal Inspection Service records which would reflect whether the individual listed in the attachment has been overheard as a result of electronic surveillance or whether there has been any electronic surveillance directed at premises owned, leased or licensed by the individual as shown on the attachment. These records did not disclose any Inspection Service overhearing of the listed individual or electronic surveillance directed at premises owned, leased or licensed by this individual.

Donald L. Diseroad
Manager, Organized Crime Division
Postal Inspection Service

Subscribed and sworn to this
25th day of September 1974

Allen O. Peffer
Postal Inspector

AFFIDAVIT

United States
of America
Judicial District
of Columbia

Philip Litman, being first duly sworn, deposes and says:

1. That I am employed as a Senior Technical Analyst, Intelligence Division, Internal Revenue Service, 1111 Constitution Avenue, Washington, D.C.

2. There are two functions within the Internal Revenue Service charged with the responsibility for surveillance by electronic means, including mechanical devices, and the maintenance of files pertaining to these activities; the Intelligence Division and the Internal Security Division, Inspection Service.

3. That a portion of my responsibilities involves the maintenance and the searching of the Intelligence Division electronic surveillance files. These files are kept at the Internal Revenue Building, 1111 Constitution Avenue, Washington, D.C. The electronic surveillance files of the Intelligence Division contain a record of each instance of surveillance by electronic means, including the overhearing or recording of telephone and non-telephone conversations without the consent of every party to the conversation.

4. On December 29, 1966 the Commissioner of Internal Revenue directed all Intelligence Division Special Agents and their supervisors to advise the National Office of all electronic

surveillance activities in which they engaged since July 1, 1958. This information was incorporated in our files and consequently provides a comprehensive record of all electronic surveillance activities during that period. Since the time of the above directive, the approval of the Intelligence Division National Office, located at Washington, D.C., has been required for any electronic surveillance activities. Therefore, the Intelligence Division files located in the National Office contain a complete record of all instances of surveillance by electronic means since July 1, 1958 conducted by Intelligence Division personnel.

5. These electronic surveillance files are indexed under the names of individuals who were the subjects of electronic surveillance, or attempted electronic surveillance. Only in those instances where a surveillance was conducted at a premises where the identity of the individual under surveillance could not be ascertained are our files indexed by address or other geographical location.

6. Pursuant to the September 18, 1974 request of the Chief, General Crimes Section Criminal Division, Department of Justice, I personally searched the electronic surveillance files of the Intelligence Division for a record of electronic surveillance of the following individual:

JOHN VAN ORSDELL
305 Fairlamb Avenue
Havertown, Pennsylvania

330 West 12th Street
New York City, New York

353 W. 46th Street
New York City, N.Y.

7. Our files disclose that the individual mentioned in paragraph 6 above was not subject of any electronic surveillance conducted by the Intelligence Division. No conversations in which he participated were intercepted, overheard, or recorded through electronic surveillance conducted by the Intelligence Division.

8. I have not checked the electronic surveillance files of the Inspection Service, the only other function within the IRS charged with responsibility for surveillance by electronic means. However, I have been advised that their files have been searched and that the individual mentioned in paragraph 6 above was not the subject of surveillance by them. They further advise that no premises owned, leased, or licensed by this individual were subject to surreptitious entry.

Philip Litman
Senior Technical Analyst
Intelligence Division

Subscribed and sworn to
before me this 23rd day
of September, 1974 at
1111 Constitution Avenue,
Washington, D.C.

Laurence Lucey
Special Agent

Norman E. Sperio
Witness

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

United States of America,

Plaintiff

v.

John Van Orsdell,

Defendant

RECEIVED
SEP 6 1974
CRIMINAL DIVISION

Affidavit of George C. Corcoran
Assistant Commissioner for Investigations
Office of Investigations
United States Customs Service

City of Washington)
) ss
District of Columbia)

George C. Corcoran, being duly sworn deposes and says:

1. That he is now and since February 17, 1974, has been Assistant Commissioner for Investigations, Office of Investigations, United States Customs Service; that as part of his assigned duties he has been and is responsible for the supervision and coordination of responses to all inquiries from the United States Department of Justice concerning information regarding electronic surveillance which may have been conducted by the United States Customs Service in connection with various individuals and/or premises named or described by the United States Department of Justice.

2. That, in response to a request contained in a letter from the Chief, General Crimes Section, Criminal Division, United States Department of Justice, and at his specific direction, a name search for John Van Orsdell, named in said letter, was made of manual card files and computer records maintained or accessed at the Office of Investigations, United States Customs Service, Washington, D. C.; that, at his specific direction, a name search for John Van Orsdell was made of manual card files maintained at the Office of the Regional Director (Investigations), New York, which office has investigative jurisdiction over Southern New York State; that, at his specific direction, a name search for John Van Orsdell was made of manual card files maintained at the Office of the Regional Director (Investigations), Baltimore, Maryland, which office has investigative jurisdiction over the Eastern portion of the State of Pennsylvania.

3. That, as a result of the searches described above, it was reported to him that the records searched contained no reference or other information indicating that this individual has been overheard or monitored in the period between July 1, 1973, and October 31, 1973, during the course of electronic surveillance where one of the parties may have consented thereto, or any surveillance conducted pursuant to Title III or otherwise, regardless of the basis for the surveillance. Additionally, the search of U. S. Customs Service records revealed no instances of electronic or other surveillance, or monitoring during the course of such surveillance

by U. S. Customs agents or employees of any premises known to be owned, leased or licensed by this individual, where one of the parties may have consented thereto.

George C. Corcoran
Assistant Commissioner (Investigations)

Subscribed and sworn to before me this 27th day of September, 1974.

Notary Public
My Commission Expires February 14, 1979

Defendant

AFFIDAVIT OF KATHERINE KOUCHIS

City of Washington)
) ss.
District of Columbia)

KATHERINE KOUCHIS, being duly sworn, deposes and says:

1. I am an Intelligence Research Specialist, United States Secret Service, Department of the Treasury.

2. One of my principal duties is to receive requests from the Department of Justice pertaining to information on electronic surveillance; and to research the files of the Secret Service to determine whether or not any individual so requested by the Department of Justice has been the subject of any electronic surveillance.

The Records Management Division of the U. S. Secret Service contains the major indices and records of this Service, by names, addresses and telephone numbers. This is, in effect, the central file section of the Secret Service.

A second, more selective index is recorded in our Headquarter Intelligence Division. These checks are made by name only.

Our Headquarters Counterfeit Division maintains a separate file and log pertaining to individuals who were subjected to investigative electronic surveillance, wiretaps, etc., and these cases are indexed by name only.

Appropriate checks are made through all of the above three Divisions of this Service in official inquiries from the Department of Justice.

3. By letter dated September 18, 1974, the Chief, General Crime Section, Criminal Division of the Department of Justice requested the United States Secret Service to advise him whether the individual as listed on the attached sheet and incorporated herein as a part of this affidavit, has been subject to electronic surveillance. Further, the Chief of the General Crime Section requested the United States Secret Service to advise him whether any of the premises, including the

attached list of premises, known to be owned, leased or licensed by this individual had been the subject of any electronic surveillance or whether there were any [illegible] of surreptitious entry onto any premises owned, leased or licensed by the subject individual. The request covered the period from July 1, 1973, to October 31, 1973.

4. In order to determine whether there have been any surveillance or entries, I caused a search to be made of the appropriate files of the Secret Service.

5. The files of the United States Secret Service indicate that there have been no electronic surveillances of the individual or of any of the premises listed on the attached sheet, nor has the individual listed been overheard pursuant to an electronic surveillance during the period July 1, 1973, to October 31, 1973; further the files of the Secret Service indicate that there has been no surreptitious entries onto the premises indicated on the attached sheet.

Katherine Kouchis
KATHERINE KOUCHIS

Subscribed and sworn to this 27th day of September 1974.

Edith J. Roberts
Notary Public, District of Columbia
My Comm. Expires: 9/30/74

ATTACHED LIST OF INDIVIDUAL,
SUBJECT AND PREMISES

JOHN VAN ORSDELL

305 Fairlamb Avenue
Havertown, Pennsylvania

330 West 12th Street
New York City, New York

353 W. 46th Street
New York City, New York

AFFIDAVIT

William J. Durkin, being duly sworn, deposes and states:

1. I am the Assistant Administrator for Enforcement, Drug Enforcement Administration, United States Department of Justice.

2. By memorandum dated September 16, 1974 the Assistant Attorney General requested that the Drug Enforcement Administration supply him with all electronic surveillance information pertaining to John Van Orsdell and any premises in which he has proprietary interests.

3. I caused a search to be made of the files of the Drug Enforcement Administration, Washington, D.C. and the Drug Enforcement Administration's New York, New York Regional Office which would contain any record of such electronic surveillance.

4. The electronic surveillance records of this Agency do not disclose overhearings of any conversations in which John Van Orsdell was identified as a participant.

5. This Agency has not conducted any electronic surveillance on any premises of which John Van Orsdell is known to have been the owner, lessee, or licensee.

William J. Durkin
Assistant Administrator for Enforcement
Drug Enforcement Administration

Subscribed and sworn to before
me this 1st day of October, 1974.

Notary Public

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed, by U.S. Mail, First Class, 3 copies of the attached Brief of Defendant-Appellant to the office of the United States Attorney, United States Court House, Foley Square, New York, New York.

DATED: New York, New York
April 30, 1975

MARK LEMLE AMSTERDAM